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These principles will be the expression of the common bond of moral ideals and material interests which has long existed in fact between the civilized peoples of the world, but which has failed to receive adequate recognition by governments because of the outworn traditions by which their diplomacy has been guided and because of the failure of the general public to realize that international good will, to be effective against the occasional wrongdoer, must take the form of institutions organized to bring the forces of the community to bear upon those who would override the law. The war has sharpened the sense of international unity by bringing out into clear perspective the malevolent character of the forces opposed to it. To cement the unity of the nations a new constitutional law is needed which only an international legislature can enact.

A League of Nations and International Law. One of the most hopeful tendencies in current discussion of the "great settlement" is the increasing emphasis upon the underlying causes of international disorder rather than upon its superficial manifestations. Another factor in the present situation that is heartening to democrats everywhere is the possibility of organizing some kind of a concert of nations out of the existing chaos. Such a concert ought to give real significance to a settlement whose terms are conceived in a new and chastened spirit. There are encouraging indications that some kind of rudimentary supernational authority will be constituted, and that, so far from being "a wondrous entity fashioned out of preceding nothingness," it will be founded upon realities and in intimate contact with the fundamental causes of international friction. All this gives promise of a better future for the society of nations. Furthermore, it is widely appreciated that the permanence of a league of nations must rest upon the reign of law and that in important respects the existing body of international law is quite inadequate. It does not seem to be appreciated, however, that the entire theory of international law must undergo drastic revision, and that there is a practical relation between an early revision of theory and the permanent success of a league of nations.

The Theory of International Law. The unreality of the modern law of nations is more a matter of theory than of substance. While jurists of all countries have shown an increasing disposition to derive substantive rules from positive sources, they have never ceased trying to reconcile substantive rules with a theory which, in most of its essential ideas, still rests upon the leading principles of the naturalists of the seventeenth

and eighteenth centuries. How unreal, for example, is our conception of the state as an international person. International personality being admitted, theory denies any difference between an inland state and a maritime state, between a state of 400,000,000 inhabitants and one of 400,000, between a petty kingdom perched on a mountain top and an empire whose flag floats over one quarter of the earth, between a state having a thoroughly liberal constitution and another whose constitution may be a constant menace to peace. It would seem that theory is not far advanced in this respect from the simple proposition of Hobbes and Pufendorf that *civitates semel institutae induunt proprietates hominum personales*.

Similarly, our theory of the relation between nations is little more than a modern version of the theory of the naturalists that international society is a state of nature, in which there is a perfect equality of natural rights, and in which the ordinary legal remedy is self-help in the form of threats and display of force, reprisals, rupture of diplomatic relations and war. While we have abandoned the idea that international law is simply the law of nature applied to independent states in a state of nature, our law of nations is still in theory *inter* instead of *supra*, independence is theoretically unlimited, and it is an open question whether the so-called law between nations is really law in any true sense or is simply a body of pious *voeux*.

Finally, the theory of modern international law denies the existence and even the possibility of supernational institutions. Every tendency toward international organization has been denounced as *un fait politique* in sharp contrast with what might be called *un fait juridique*. For how, queries the publicist, can you have supernational institutions when sovereignty is unlimited, when states are naturally equal, and when law is between states and not above them?

These are some of the most obvious defects in a theory that is quite out of contact with important tendencies in international relations. Some of its practical consequences may be suggested. Thus the tendency of the books to emphasize rights while neglecting remedies is largely the consequence of an unsound theory. Here, too, is a partial explanation for that anomalous body of precepts called the laws of civilized warfare. The same theory is responsible for the classification adopted in most of the books, a classification which has nothing to commend it except the circumstance that for more than a century it has passed "like gaping from mouth to mouth."

On the other hand, the theory of international law has prevented the

recognition of elemental principles of classification which must be admitted if the league of nations is to have permanence. The law of nations recognizes no difference, for example, between rules applicable to the relations between international persons and rules of organization. The point may be clarified by taking an illustration from national experience. Within nations private law is distinguished from public law, and constitutional and administrative law are included in the latter category. Many legal principles are limited in their application to private law, i.e., to rules applicable to the relations between persons and to the acquiring of rights and the assuming of obligations under such rules. They may be inapplicable from their very nature to rules of organization. The law of nations as expounded in the books recognizes no such distinction. The reason for this is found in the persistent refusal of the publicists, with a few illustrious exceptions, to recognize the existence of rudimentary supernational institutions. Rules applicable only to the relations between states have been applied indiscriminately to the problem of international organization, and the whole movement toward supernational authority has been confused and retarded.

The success of a concert of nations will be compromised at the outset if publicists and diplomats set about the work of reconstruction in the spirit of those high priests who sought to replace stone and pillar of the temple upon which profane hands had recently been laid. There was a good deal of unstable stuff in the temple of international justice, and much of it has been destroyed beyond repair. There is hardly a text or treatise that should not be obsolete the day peace is proclaimed, not because the substance of the books is valueless, but because the substantive rules have been fitted into a theoretical scheme of things that is as unreal as it is impractical. If a league of nations secures general recognition the theory of international law will be revolutionized. It must be revolutionized if the concert of nations is to be a permanent success.

It is suggested that as an essential preliminary to this readjustment the theory of international law should be tested in its relation to the realities of international relationships; and that the test may be applied conveniently from three different points of view, which may be stated in the form of three questions: (1) How far does theory accord with the facts of international relations? (2) How far do those facts with which theory agrees constitute elements that should be conserved, and to what extent should they be eliminated in the interest of a better international order? (3) How far does theory, wherever it is not in accord

with the facts, offer a rational ideal for future development? The application of these or similar criteria should result in a useful revaluation of nineteenth century notions of personality, society, law, and organization in the theory of international law. It should suggest, among other things, the importance of taking into account the constituent elements prerequisite to state existence, of placing less emphasis upon independence and more upon interdependence, of regarding the law of nations as supernational rather than international, and of recognizing the evolution of supernational authority as a logical and desirable development in the society of nations.

The "Equality of Nations." There are few principles of international law that are likely to cause as much difficulty in the actual constitution of a league of nations as the postulate of absolute equality among sovereign and independent states. "Relative magnitude creates no distinction of right," says Sir William Scott, "relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor; and any advantage seized upon that ground is mere usurpation."¹ According to Chief Justice Marshall: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."² In these famous dicta the learned justices were simply repeating what had been taken as axiomatic by a majority of the publicists since the days of Pufendorf and the founding of the naturalist school. The "equality of nations" in international law was a creation of the publicists. It was derived from the application to nations of theories of natural law, the state of nature, and natural equality. An analogy was drawn between nations in international society and men in a state of nature. Thus the natural law became the law of nations, international society was regarded as a state of nature, and nations were presumed to enjoy a perfect equality of natural rights. Once established by this process of reasoning the principle was reinforced by theories of sovereignty. The absolute equality of sovereign states became a postulate of *le droit des gens théorique*.

The maxim has an important legal significance in the theory of modern international law. It is the expression of two important legal

¹ *Le Louis*, 2 Dodson 210, 243.

² *The Antelope*, 10 Wheaton 66, 122.

principles with reference to which there is an extraordinary confusion of thought and of statement in the books. The first principle may be described as equal protection of the law or as equality before the law. Nations are equal before the law when all are equally protected in the enjoyment of their rights and equally compelled to fulfill their obligations. Equality before the law is not inconsistent with grouping nations into classes, and attributing to the members of each class a status which is the measure of their capacity for rights. Neither is it inconsistent with inequalities of representation, voting power, and contribution in an international concert. The second principle is usually described as equality of rights and obligations, or more often simply as an equality of rights. The description comes down to us from theories of natural law and natural right. What is really meant is an equality of capacity for rights. In this sense equality is the negation of status. If applied without qualification to the organization of an international concert it would require equal representation, contribution, voting power, etc. Equality before the law is absolutely essential to a stable society of nations. If it is denied, the alternatives are universal empire or universal anarchy. Equality of capacity for rights, on the other hand, is not essential to the rule of law. Strictly speaking, it has never been anything more than an ideal in any system of law. Among nations, where there is such an utter lack of homogeneity in the physical bases for separate national existence, there are important limitations on its utility even as an ideal.

Equality among nations is frequently explained and justified by drawing an analogy with the situation of human beings under municipal law. Perhaps there is a lesson in national experience. It is generally assumed that equality of legal capacity among persons subject to law is the ideal toward which a system of private law ought to develop; but it has never been regarded as a necessary consequence that the same principle should be taken for an ideal in perfecting national organization, much less that it should be given practical application in the form of equal participation in government. No civilized government has ever tried to combine universal suffrage, the folk-moot, and the liberum veto. It may be suggested parenthetically that the organization of human beings on such a basis would be less unreal and would give greater promise of success than the organization of nations on the same principle. The problem of supernational organization ought never to have been confused and complicated by the "equality of nations." Even granting that equality of capacity for rights is sound as a legal principle, its

proper application is limited to rules of conduct and to the acquiring of rights and the assuming of obligations under those rules. The principle is inapplicable from its very nature to rules of organization. Insistence upon perfect equality in the constitution of a union, tribunal, or concert of nations is simply another way of denying the possibility of supernational government.

It is significant that almost every writer who has seen the possibility of rudimentary supernational institutions has doubted or denied the dogma of equality. It is more significant that wherever anything of the nature of a rudimentary supernational institution has made its appearance in the actualities of international relations the principle of equality has been compromised. The evolution of primitive supernational government is of great importance because it undoubtedly furnishes our safest guide in promoting the further development of a concert or league of nations. It suggests facts which may be relied upon to support a concert that is constructed on principles grounded in experience, as well as pitfalls that are certain to be encountered if the lessons of experience are disregarded.

At least as early as the nineteenth century, nations began to emerge from the state of nature and to lay crude foundations for organization. The concerted action of the great powers, launched during the Napoleonic wars, became a very primitive and unstable supernational legislature, executive, and court of appeal combined. Throughout the various vicissitudes of its development this concert has solved the problem of equality by excluding the secondary powers from its conferences. Admitted only when their own affairs were in question, in a consultative capacity, to present evidence and withdraw, or not at all, the nations of the second rank have never enjoyed equality with the great powers in the government of Europe. The books generally explain this circumstance as being *un fait politique* as distinguished from *un fait juridique*.

There has appeared a significant tendency to qualify the perfect "equality of nations" in the development of supernational administrative unions. In several of the most important unions equality has been compromised by admitting representatives of colonies, thus according to the colonial nations several times as much representation as that accorded to others. The principle of majority decision in voting has received some recognition. In several cases voting power has been divided among the nations represented in the same proportion in which they share in the financial support of the union, thus recognizing a

thoroughly sound principle, namely, that equality of influence implies equality of responsibility. Two attempts were made at the beginning of the twentieth century to constitute true supernational courts, one the so-called international court of prize for which provision was made by the second Hague Peace Conference, and the other the court of arbitral justice, wrecked at the same conference on the question of the court's composition. It was found impossible in each instance to constitute any kind of a permanent court on the basis of equality. The principle of equal representation for the eight great powers and rotation for the lesser powers was adopted for the prize court and widely advocated for the court of arbitral justice. The impossibility of admitting the "equality of nations" in constituting a court of arbitral justice was admitted in all responsible quarters, and was taken by the most conspicuous spokesman of the small states as an excellent reason for not constituting the court at all.

If the "equality of nations" is inapplicable on principle and precedent to the organization of supernational institutions, upon what other basis or bases may they be constituted? It is submitted that the fundamental basis for such a league should be the representation of population. The purpose of all government, national or supernational, is to promote the mutual welfare of human beings. In so far as it can be done consistently with the creation of practical agencies through which such a league must function, and with due regard to certain limitations on population as a basis for representation to be mentioned presently, the future concert of nations should be made as representative as possible of the human beings who inhabit the earth. Organization on this basis would be relatively simple if all people were equally civilized, but unfortunately they are not. The quantitative principle of population must be supplemented by certain qualitative tests designed to measure the degree of civilization attained by the people of each nation. This is a difficult thing to measure. It can probably be done most satisfactorily by taking account of wealth and of force, not merely potential in either case, but wealth and force which could be mobilized within a limited period if necessary.

The practicability of population and civilization as bases for the organization of a league is indicated by the fact that the concerted action of the great powers has been based in a crude way on just these factors. The defects in a concert that is restricted to the great powers can be avoided and lesser powers induced to participate on a proportional basis if the responsibilities of the concert are large, and if participation

is apportioned in the same way as responsibilities. If sharing in the concert's decisions can be made to carry with it large responsibilities, the capacity to assume these responsibilities may be made an adequate measure of the combined elements of population and civilization. Such a measure ought eventually to become almost automatic in its operation, and its application to particular nations ought to become a matter of voluntary decision on the part of each. Too much emphasis cannot be placed upon the importance of having large responsibilities to apportion. Otherwise nations will not be willing to forego their claim to equal representation and voting strength, it will be impossible to develop any loyalty to the supernational authority, and its usefulness will probably be short-lived. The matter is one of great difficulty, but the present opportunity is extraordinarily favorable. The rehabilitation of Belgium, Serbia, and Poland, the restoration of devastated areas, police of the seas, police of the Balkans, administration of contested backward areas such as Morocco, China, Turkey, and Albania, administration of important trade routes such as the straits at Constantinople and the Bagdad Railway, the assumption of war debts—all suggest possibilities.

To summarize: (1) representation in a league of nations should bear some approximate relation to population; (2) more civilized peoples should have proportionately greater representation; (3) capacity to assume responsibilities in support of and as the representative of supernational authority is a practicable measure of population and civilization.

Whatever the basis for the future league may be, the "equality of nations" will become an obsolete principle as soon as the league secures general recognition. A supernational authority, whatever it may be called, will destroy the whole foundation for the notion of equality. International society will have ceased to be a state of nature; self-help will no longer be the usual remedy; separate nations will have yielded their supremacy; the law of nations will have become *supra* instead of *inter*; instead of being an end in itself the nation will have become a part of that larger organization whose function it is to promote the well-being of humanity. It is reasonable to hope that nations can be induced to accept a new order founded on these principles if it can be made clear that such an order offers compensations for abandoning the old anarchy, provides means for securing that equality before the law which has ever been an uncertain possession among nations, and apportions influence in proportion to capacity and willingness to assume responsibilities.

E. D. DICKINSON.